The Right to Fair Trial and the Rise of Sensitive Intelligence Evidence: Responses from the Dutch and UK Courts

VB verfassungsblog.de/the-right-to-fair-trial-and-the-rise-of-sensitive-intelligence-evidence-responses-from-the-dutch-and-uk-courts/
Rumyana Grozdanova Mo 7 Mai 2018 Mo 7 Mai 2018

Writing extra-judicially, Lord Justice Brown once described the typical court approach on matters of national security as follows: “the mere incantation of the phrase [national security] of itself instantly discourages the court from satisfactorily fulfilling its normal role of deciding where the balance of public interest lies.” *(1994 Public Law)* Yet, in recent times, despite a traditional reluctance to engage with sensitive intelligence evidence – cases such as *Liversidge v Anderson* and *Cheblak,* for example *(Hans Born et al 2011)* – some national courts have become increasingly more at ease with assessing so-called secret evidence before reaching a conclusion on the appropriateness of imposing (a) particular counter-terrorism measure(s) on an individual or organisation.

In order to accommodate the complexity of such cases within the judicial framework – the core concerns being the inherent reluctance of the Executive to disclose any sensitive information on the one hand and an individual’s fair trial right protections on the other – states such as the UK and the Netherlands have adopted conditional inclusion of intelligence models (for more detailed classification see Hans Born *et al* 2015). Assessing the full impact of the relevant provisions on a) the scope of the rights most visibly impacted, b) the changing purview of judicial review and c) the overall constitutional (the Netherlands)/public law (the United Kingdom) frameworks is naturally a long term and sustained process. As such the following comments aim to address what is – and certainly should be – a vital societal concern in both of these countries, namely the limitations on the scope of the right to fair trial.

In the Netherlands, the 2006 Act on Shielded Witnesses introduced a special procedure in which members of the two principal Dutch intelligence services (AIVD and MIVD) may be heard before a special examining magistrate at a pre-trial stage. The magistrate can then decide whether, in the interest of national security, a) the particular information must remain secret and b) a witness must be “shielded” and thus remain anonymous during the core trial.

In what is one of the more significant changes introduced by the 2006 Act, the status of the AIVD reports (the documentation containing the sensitive evidence) within court proceedings has been elevated to that of official “written material” (*schriftelijk bescheiden* under Article 344 Dutch Code of Criminal Procedure). As a result, these AIVD reports could *potentially* be used as stand-alone evidence without requiring additional supporting proof. However, as the cases discussed below indicate, the Dutch courts have strongly rejected such an approach. The credibility and persuasiveness of such closed materials are assessed within court proceedings and could, in part, depend on a shielded witness’ hearing. A written outline of the verbal hearing of shielded witnesses *ought* to be included in the final procedural documents. However, if the AIVD assesses that such an inclusion is

detrimental to the interests of state security (i.e. the shielded witness can opt out of such an inclusion on the basis of detriment to national security), the written outline may not form part of the final procedural documents/court dossier.

This is an exceptional departure from the traditional remits of the AIVD and the judiciary – determining what information is part of the open procedural documents normally falls within the mandate of the magistrate rather than intelligence services. What is of particular significance is that, even if the AIVD objects to the inclusion of a written transcript of a shielded witness' hearing to the final court dossier, the closed verbal hearing/report it provided could still be used as evidence. In what is thus a substantial impediment for the legal representatives of a terrorist suspect as a result of such refusal, the legal counsel can neither question who provided the information the reports are based on nor can they assess the content of the relevant information. The resulting difficulties in critically scrutinising the factual correctness and reliability of the reports or whether there is a legal basis to challenge either puts an individual terror suspect in a rather unenviable position. In an outcome similar to the UK closed material procedures (CMP) model (see below) an individual (and their legal counsel) may therefore not be aware of the full extent of the terrorism allegations against them.

While the procedure for shielded witnesses has yet to be utilised, reliance on secret evidence in terrorism cases has increased steadily since the adoption of the Act. Unlike their UK counterparts however, the Dutch courts have so far erred on the side of precaution when assessing cases involving reliance on intelligence information. While interpreting and applying the legislation carefully and rigorously, the courts have designed an approach which both seeks to firmly safeguard fair trial guarantees and respect the 2006 Shielded Witnesses Act provisions relating to the use of sensitive intelligence evidence. Two quite recent cases stand out in particular. In 2016, the District Court of Rotterdam found that AIVD reports could be used as principal evidence although caution is required when relying on them. If an AIVD report is not sufficiently supported by the rest of the evidence in a court dossier, a court will likely find that using the intelligence information as primary evidence is in conflict with the right to fair trial under Article 6 ECHR. A subsequent 2017 case decided again in the District Court of Rotterdam confirmed this approach. The court noted that the police had not done enough to assess the reliability of the information provided by the AIVD. The court concluded that while the circumstances of the case and the statements of the defendant are most certainly suspicious, without sufficiently reliable evidence they were no more than that – *just suspicious*. In a more cutting rebuke, the court added that the specific AIVD report "does not amount to evidence, *not even* in cases concerning terrorist crimes".

In comparison, in the UK, CMPs – where the court can consider secret intelligence evidence without the defendant or his legal team being given the access to hear the evidence – have become commonplace. Individuals subjected to a CMP are however appointed a Special Advocate who is tasked with representing their interests and ensuring that their rights are protected. CMPs have so far been used in a variety of cases involving counter-terrorism measures such as proscription as a terrorist organisation, preventative detention, control orders, domestic asset freezing orders, terrorism prevention and investigation measures (TPIMs) and employment disputes, which raise questions of

national security. Since the 2013 Justice and Security Act, they can also be used in any civil proceedings, which involve national security issues. With the 2017 cases of *XH and Al*, *K, A and B* and *Kamoka*, the UK courts have reinforced the position that there is no hierarchy of cases, no single standard and no irreducible minimum disclosure threshold. And thus as the range of possible circumstances where closed evidence is used rises, so has the chasm of uncertainty between the type of cases where minimum disclosure is required and those which can proceed without any disclosure.

The most recent case raising the issue of a CMP –*Belhaj and Another v Director of Public Prosecutions and Others* – is likely to cause further ambiguity and legislative changes in the future. Under Section 6 (11) of the JSA 2013, a CMP can only be used within civil litigation and **not** in "*proceedings in a criminal cause or matter*". Despite engaging in a rather extensive analysis of what amounts to a criminal cause as opposed to a civil one, the Court's eventual conclusion was that "the review of authority on criminal appellate jurisdiction produces no real clarity". The Court decided – or rather fudged – that whilst the judicial review application in this particular case could be seen as proceedings *concerning* a criminal cause or matter, it was certainly not proceedings *in* a criminal cause or matter. Hence, there was jurisdiction to consider the Foreign Secretary's CMP application.

Naturally, the differences in the UK and the Dutch legal systems and trial models do not allow for a straightforward and direct comparison between the specialised court procedures. Yet, in its 2011 Green Paper, the UK government did expressly examine the Dutch model (and the Dutch Intelligence and Security Services Act of 2002) and assessed whether to adopt a similar approach. As such, judicial framework differences taken into consideration, the domestic courts' pushback – or lack thereof – does offer food for thought. The cautious yet firm approach of the Dutch courts towards the use of sensitive intelligence evidence despite the political and emotive pressures associated with terrorism cases is in (sharp) contrast to the obliging willingness with which the UK courts appear to approach CMPs in recent times. In light of their traditional reluctance to engage with intelligence information, the question of why the UK courts, including the Supreme Court, now seem increasingly at ease with CMPs is rather pertinent.

Prior to this more pervasive use of CMPs, the UK courts tended to rely on two core justifications when deferring to the Executive on matters of national security – either a constitutional and/or an evidential objection. *(see further Hans Born et al 2011, p.32)* The latter – that an assessment of highly secret material through conventional legal procedures would be inappropriate – is of particular relevance here. *(Hans Born et al 2011, p. 32)* The rationale behind this objection arguably stems from the intended recipients of intelligence data collection. The bulk of intelligence gathering is not directed towards or intended for a legal action, at least not as an immediate goal, but rather for disrupting terrorist related activity and pre-empting current and future threats. Due to its secret nature, when such evidence becomes a part of legal proceedings, a claimant can face evidential difficulties while states usually have (significant) procedural protections. *(Hans Born et al 2011, p. 32)* When the traditional reluctance of the judiciary to question matters of national security is added, the resulting effect is barriers to transparency, clarity and certainty as to what case (and evidence) an individual and their legal counsel are actually challenging.

The plethora of cases now engaging CMPs indicates that as there is a more bespoke judicial procedure, the UK courts are moving away from their previous evidential objections and are becoming increasingly more willing to review intelligence information and impose counter-terrorism measures based on it. While perhaps less firm and more deferential to the Executive than their Dutch counterparts, the UK courts approach could be seen as a pragmatic acceptance that they have to adapt their approach to sensitive intelligence evidence in light of the current counter-terrorism and security environment they operate in. As states increasingly focus on preventing extremism and radicalisation as a vital first step before employing other pre-emptive counter-terrorism measures to foil future attacks, widespread intelligence data collection and cross-border exchange of this data have become key elements in domestic and transnational counter-terrorism security operations. States' continuous commitment to collaborative and transnational counter-terrorism responses and joint intelligence gathering since the events of 9/11 has resulted in an environment described as the evermore "international world of domestic security agencies" *(Born et al 2011, p. 32).*

Thus, an adjustment of approach by the UK courts in this context could ensure that, as there is a Special Advocate appointed, some form of judicial review over the intelligence evidence used and scrutiny of the reasoning behind the imposition of a (particularly) onerous counter-terrorism measure by an experienced judge, an individual's right and dignity are (somewhat) protected. While this approach, due to the nature of a CMP, could be viewed as a less public expression of judicial deference to the Executive's assessment of what is necessary in the interests of national security, it can also be argued that it prevents the establishment of a model similar to the US where the (over)use of the state secret privilege has effectively amounted to an absolute bar on access to the courts by individuals seeking redress (*see for example the cases of El-Masri v. Tenet 437 F. Supp. 2d 530 (E.D. VA. 2006), Arar v. Ashcroft 414 F.Supp.2d 250 (E.D.N.Y. 2006) and Mohamed v. Jeppesen Dataplan, Inc, No. 08-15693 D.C. No. 5:07-CV-02798-JW, 9th Circuit Court of Appeal; Hans Born et al 2011, p. 232 – 240*). In other (optimistic) words, by respectively threading a pragmatic and a cautious yet firm path through these new legislative developments driven by the Executive, the UK and Dutch courts are seeking to achieve the same goal – remain guardians of the law and ensure that justice is done even if it is not seen to be done.

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION Grozdanova, Rumyana: *The Right to Fair Trial and the Rise of Sensitive Intelligence Evidence: Responses from the Dutch and UK Courts, VerfBlog,* 2018/5/07, https://verfassungsblog.de/the-right-to-fair-trial-and-the-rise-of-sensitive-intelligence-evidence-responses-from-the-dutch-and-uk-courts/.